(18)

No. 83-712



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEW JERSEY,

*Petitioner,*

—v.—

T.L.O., A Juvenile,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW JERSEY

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICI CURIAE* FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, JUVENILE RIGHTS DIVISION, AND ADVOCATES FOR CHILDREN OF NEW YORK, INC. IN SUPPORT OF RESPONDENT

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HENRY WEINTRAUB, ESQ.
JOSEPH WILLEY, ESQ.



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MOTION FOR LEAVE TO FILE
A BRIEF AMICI CURIAE

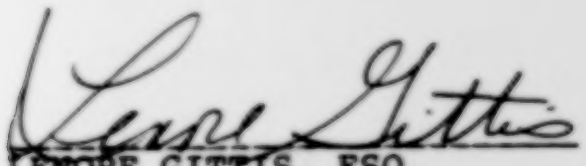
The Legal Aid Society of the City of New York and Advocates For Children of New York, Inc., move this Court for leave to file a brief amici curiae in support of respondent in the above case.

Consent to file an amici curiae brief was obtained in writing from Lois DeJulio, First Assistant Deputy Public Defender, State of New Jersey, counsel

for respondent. Consent was sought but has not been obtained from the Attorney General of the State of New Jersey, counsel for petitioner.

Dated: New York, New York
August 20, 1984

Respectfully submitted,



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AFFIDAVIT

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

HENRY S. WEINTRAUB, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice before this Court and am of counsel to LENORE GITTIS, ESQ., The Legal Aid Society of the City of New York, Juvenile Rights Division.

2. I submit this affidavit in support of a motion by The Legal Aid Society of the City of New York and Advocates For Children of New York, Inc., for an order granting leave to file an amici curiae brief in support of respondent.

3. On behalf of The Legal Aid Society and Advocates For Children, I requested consent of the parties to submit an amici curiae brief in this Court. On August 1, 1984, I spoke with counsel for respondent, Lois DeJulio, First Assistant Deputy Public Defender of New Jersey. Ms. DeJulio orally consented and, in a letter dated August 6, 1984, transmitted written consent.

4. On August 9, 1984, I spoke with counsel for petitioner, Allan Nodes, Deputy Attorney General of New Jersey. I requested consent to submit an amici curiae brief in this Court. Mr. Nodes



informed me that he could not consent and that I should submit a written request. I was advised, however, that consent would probably not be granted and a motion would be necessary. On August 9, 1984, I transmitted a letter to Mr. Nodes formally seeking consent to the submission of an amici curiae brief. As of this date, I have not received a response to that request.

5. The Legal Aid Society, Juvenile Rights Division, and Advocates For Children of New York, Inc., bring a unique perspective to bear on this case by virtue of their substantial experience in representing children in school-related matters:

a. The Legal Aid Society is a private, non-profit legal assistance agency, which since 1876, has sought to provide quality legal representation to persons living in New York City who can-

not afford to pay a private lawyer. The Juvenile Rights Division of The Legal Aid Society, has been in existence since 1962, and is the single largest organization representing children in the United States. In addition to traditional courtroom representation of juveniles, the Division has provided representation to numerous juveniles in public school disciplinary proceedings.

b. Advocates for Children of New York, Inc. (AFC) is a fifteen year old voluntary, non-profit children's rights project. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in individual and class actions and participation in legislative hearings and other public advocacy activities.

6. Amici request permission to submit this brief because of their con-



cern about the impact of this case on their clients, on the educational system and on the administration of justice in juvenile and adult courts. The central issue presented in this case - whether a public school student's constitutional rights were violated when a public school official searched her purse - is obviously of great importance to the thousands of students represented by amici. Amici wish to provide this Court with an analysis of the legal issues and, based upon their extensive experience in school related matters, the implications of a decision by this Court.

WHEREFORE, for the reasons stated above, The Legal Aid Society, Juvenile Rights Division, and Advocates For Children of New York, Inc. respectfully request permission to submit a brief amici curiae in support of respondent in this case.

HENRY S. WEINTRAUB

Sworn to before me this
21st day of August, 1984

Notary Public

JANE M. [illegible]
Notary Public, St[illegible]ew York
No. 4616922
Qualified in K[illegible]
Commission Expires A[illegible] 30, 1985



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# AMICI CURIAE BRIEF FOR THE LEGAL AID SOCIETY OF THE CITY OF NEW YORK, JUVENILE RIGHTS DIVISION, AND ADVOCATES FOR CHILDREN OF NEW YORK, INC.

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## INTEREST OF AMICI CURIAE

The Legal Aid Society is a private, non-profit legal assistance agency, which since 1876, has sought to provide quality legal representation to persons living in New York City who cannot afford to pay a private lawyer. The Soci-

ety has a full-time staff in excess of 600 attorneys, who provide assistance to more than 200,000 people a year in all trial courts in New York City, in the state and federal appellate courts and in this Court.

Amicus curiae, the Juvenile Rights Division of The Legal Aid Society, has been in existence since 1962, when the New York State Legislature enacted the Family Court Act and mandated the assignment of counsel in juvenile proceedings. The Juvenile Rights Division is the single largest organization representing children in the United States. At present, it comprises 78 trial, appellate and special litigation attorneys and a social services support staff of 38, including four full-time educational consultants, whose primary responsibility is the representation of juveniles who are the subject of Family Court pro-



ceedings in New York City. In 1983, the Juvenile Rights Division lawyers (referred to by state statute as "law guardians") were assigned as counsel in approximately 17,000 proceedings, including cases involving juvenile delinquency, status offenses, and child abuse and neglect. The Division's Special Litigation Unit also initiated actions including, inter alia, actions to effectuate the educational rights of its clients. In addition, the Division provides representation to numerous juveniles in public school disciplinary proceedings. These administrative proceedings, as well as the delinquency cases, have raised questions at times about the legality of searches of public school students.

Advocates For Children of New York, Inc. (AFC) is a fifteen-year-old voluntary, non-profit, children's rights or-

ganization. AFC's activities have focused on securing and defending the educational rights of New York City public school students through representation in individual and class actions, presentation of testimony in public hearings and other advocacy activities. AFC handles approximately 1,300 individual students' cases annually, providing assistance to suspended students, school crime victims, students with handicapping conditions, students at risk of becoming drop-outs, and students denied educational opportunity because of language barriers, sex and race discrimination, low achievement and adjustment problems. In a class action relevant to this case, AFC has served as co-counsel in Boe v. Board of Education, 80 Civ. 2829 (S.D.N.Y.), a suit challenging due process violations in school suspension hearings.



AFC currently serves on the New York State Board of Regents' Advisory Council and on numerous New York City Board of Education advisory councils and committees. As part of a nationwide effort by the National Coalition of Advocates for Students, AFC sponsored hearings on the state of public schools in New York State in May 1984. AFC has offered testimony at numerous legislative hearings at the city, state and federal levels on school discipline, quality of education, and the rights and needs of at-risk students.

Importantly, from 1981 through 1983, both amici served on the New York City Mayor's and School Chancellor's Joint Task Force on School Safety, participating in the formulation of final recommendations to improve safety and discipline practices in New York City public schools.

Amici are vitally concerned about the quality of education in this nation's public schools. At the same time, amici are extremely troubled by the prospect that public school students will be denied the valued safeguards vouchsafed by the Fourth Amendment to the United States Constitution. Amici are convinced that the legitimate interests of excellence in education and school safety can be satisfactorily achieved without a wholesale deprivation or substantial dilution of Fourth Amendment rights in the public school context.

The central issue presented in this case - whether a public school student's constitutional rights were violated when a public school official searched her purse - is obviously of great importance to the thousands of students represented by amici. Amici submit this brief because of their concerns about the impact



of this case on their student clients, on the educational system and on the administration of justice in juvenile and adult courts. Based upon their extensive experience in school-related matters, amici wish to provide this Court with a unique analysis of the legal issues and the implications of a decision by this Court in this matter.

## QUESTION PRESENTED

> Whether the assistant vice-principal violated the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case.[1]

## SUMMARY OF ARGUMENT

This Court has consistently held that public school students have constitutional rights which are enforceable against the State. The State of New Jersey's involvement in its public school system is pervasive through its

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[1] Amici adopt the summary of facts in Brief of Respondent at 2-6.

statutory education scheme. Therefore, New Jersey public school officials act under the authority of the State and, as governmental agents, are subject to the Fourth Amendment in conducting searches of public school students.

The employment duty of public school officials to maintain a safe environment conducive to education leads to the conclusion that searches by them constitute governmental action. In the present case, the assistant vice principal searched T.L.O. as part of the disciplinary responsibilities of his position. Searches to enforce school regulations may lead to the discovery of violations of the criminal law. As in the present case, many jurisdictions impose a legal duty on public school officials to report such violations to the police, further emphasizing the governmental character of school searches.



The doctrine of in loco parentis is not consistent with the contemporary responsibilities of public school officials towards their students and cannot be applied to take searches of students by public school officials out of the ambit of the Fourth Amendment.

Public school students have a legitimate expectation of privacy in their person and in their belongings when they enter school. Society recognizes that public school students have substantial privacy interests and is not prepared to extinguish those interests at the schoolhouse gate. When balanced against the state's interest in maintaining an environment conducive to learning, the student's interest in being free from arbitrary and intrusive searches by public school officials is great. To hold that public school students have absolutely no expectation of privacy would

equate them to convicted incarcerated inmates.

Well-established constitutional principles as well as sound reasons of public policy compel a conclusion that searches of school children by public school officials be tested against the Fourth Amendment probable cause standard. Student searches frequently involve intrusive searches of the person and personal effects. To protect students from arbitrary invasions of privacy, public school officials should be required to abide by the traditional limitations the Constitution places on official conduct.

When public school students are secure from unreasonable searches that threaten their privacy, significant benefits inure to the overall education process. Strict adherence to constitutional principles is essential if school



children are to learn the concepts of fairness, justice and privacy upon which our Constitution was founded.

No exigent circumstances were present in the case at bar to justify relaxation of Fourth Amendment standards and the decision of the New Jersey Supreme Court that the search of T.L.O. was unreasonable must be affirmed.

## ARGUMENT

### POINT I

### SEARCHES OF PUBLIC SCHOOL STUDENTS BY PUBLIC SCHOOL OFFICIALS ARE SUBJECT TO THE FOURTH AMENDMENT.

A. The Search by the Public School Assistant Vice Principal Was Conducted Under State Authority and Therefore Constituted Governmental Action Subject to the Fourth Amendment.

Public school officials, as governmental agents, are subject to the restraints of the Fourth Amendment. They are employed by a governmental entity, work in a public institution, are paid with public funds and perform a governmental function. In addition, their employment duties to maintain a safe and orderly school environment for their students, whose presence is compelled by law, to investigate unlawful activity, and to report unlawful activity to the police epitomize the governmental, as opposed to private, character of their actions. There can be no question that



their actions are cloaked with the authority of the state. Therefore, searches of public school students by public school officials fall under the purview of the Fourth Amendment.

Public school students, like adults, have constitutional rights which are enforceable against governmental authorities. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969) (First Amendment freedom of speech). This Court has declared that "[t]he Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted." West Virginia Board of Education v. Barnette, 319 U.S. 624, 637 (1943) (First Amendment freedom of religion). As Justice White noted in a decision upholding the due process rights of public school students: "The

authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." Goss v. Lopez, 419 U.S. 565, 574 (1975).

The vast majority of federal and state courts which have considered the issue of whether the search of a public school student by a public school official constitutes state action have found governmental action within the scope of the Fourth Amendment. For an extensive compilation of cases see Brief of Respondent at 17, n. 5.[2]

Governmental officials as a class

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[2]The Department of Justice, by not raising the issue in its brief in this matter, has essentially conceded that the search of a public school student by a public school official constitutes governmental action for Fourth Amendment purposes. See Brief for the United States as Amicus Curiae Supporting Reversal.



are bound by the constraints of the Fourth Amendment. Burdeau v. McDowell, 256 U.S. 465, 475 (1921); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978). The "basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

New York's highest court has held that, "[i]n exercising their authority and performing their duties, public school teachers act not as private individuals but perforce as agents of the State." People v. Scott D., 34 N.Y.2d 483, 486, 358 N.Y.S.2d 403, 406, 315 N.E.2d 466, 468 (1974)[3]. In the pres-

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[3]Petitioner misstated the law of New York State in relying upon a lower court

ent case, there is no question that the assistant vice principal, Mr. Choplik, searched the student, T.L.O., as part of his duties as an official of the Piscataway Public Schools. In describing his duties, the assistant vice principal stated: "[W]e're responsible for ... taking care of any kind of disciplinary problems ...." (TS 41-19 to 21).[4] He stated that his "capacity" at "work" on the day of the search was "... in the office taking care of some discipline problems." (T 8-8 to 11). As this

(footnote continued)

opinion, People v. Stewart, 63 Misc.2d 601, 313 N.Y.S.2d 253 (Crim. Ct. 1970), which is no longer good authority in light of the New York Court of Appeals decision in People v. Scott D. See Supplemental Brief for Petitioner, at 13 n. 7.

4"TS" designates the transcript of the hearing on the Motion to Suppress held on September 26, 1980. "T" refers to the transcript of the trial conducted on March 23, 1981.



Court has held: "If an individual is possessed of state authority and purports to act under that authority, his action is state action." Griffin v. Maryland, 378 U.S. 130, 135 (1964).

The State of New York, which has been found to be "inextricably entwined in its various municipal school systems ...," Bellnier v. Lund, 438 F. Supp 47, 51 (N.D.N.Y. 1977), has a statutory education scheme comparable to that of New Jersey. In finding state action in the search of students by public school officials, the Bellnier District Court relied explicitly on New York statutes regarding compulsory education, teacher regulation, and most importantly, indemnification of school personnel for attorneys fees and expenses resulting from defending a legal action resulting from

an attempt to discipline a student.[5]

The interest asserted in this case by the State of New Jersey to justify the search of T.L.O., i.e., "to protect the health of respondent and her peers and to facilitate school discipline" (Supplemental Brief for Petitioner upon Reargument at 14), is one of the very bases utilized by courts to support the holding that public school officials' actions constitute governmental action subject to the Fourth Amendment. In finding teachers and administrators subject to the Fourth Amendment, a number

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[5]N.Y. Education Law §§ 3202, 3205, 3210 (compulsory education); 3001-3020 (regulation); 3028 (indemnification) (McKinney 1981). Bellnier v. Lund, 438 F. Supp. 47, 51-52 (N.D.N.Y. 1977). Compare, e.g., N.J. Stat. Ann. §§ 18A:38-1 to -3, -25 to -27 (compulsory education); §§ 18A:6-7, -10, -38; 18A:26-1 to -10; 18A:27-2, -4 to -6; 18A:28-4 to -6, -8; 18A:29-4, -4.1; 18A:30-1 to -7 (regulation); §§18A:16-6, -6.1 (indemnification) (West 1968 & Supp. 1984).



of courts have stressed the employment duty of such public school officials to maintain a safe environment conducive to education. See, e.g., Horton v. Goose Creek Independent School District, 690 F.2d 470, 480 (5th Cir. 1982), cert. den., ___ U.S. ___, 103 S. Ct. 3536 (1983); People v. Jackson, 65 Misc.2d 909, 910, 319 N.Y.S.2d 731, 733 (App. Term 1971), aff'd, 30 N.Y.2d 734, 333 N.Y.S.2d 167, 284 N.E.2d 153 (1972). In New Jersey, among other states, teachers are statutorily required to hold pupils accountable for disorderly conduct. N.J. Stat. Ann. § 18A:25-2 (West Supp. 1984).

There is but a fine line between a public school official's responsibility to maintain order and safety and the actual enforcement of the criminal law. The New York Court of Appeals aptly noted that "searches for noncriminal pur-

poses often lead to evidence forming the basis for a criminal prosecution." People v. Scott D., 34 N.Y.2d at 487. Moreover, school officials have a duty to investigate unlawful activity. People v. Overton, 20 N.Y.2d 360, 363, 283 N.Y.S.2d 22, 25, 229 N.E.2d 596, 597 (1967); State v. Baccino, 282 A.2d 869, 871 (Del. Super. 1971).

It is common for school officials to be required by statute (See examples compiled in Brief of Respondent at 20 n. 9) or by school policy to report violations of the criminal law to the police. The employment duty to report to the police goes beyond that of a private citizen and so further emphasizes the governmental rather than private character of student searches by public school officials. In the present case, Mr. Choplik, the assistant vice principal, affirmed that he was obligated by the



policy of the Piscataway Board of Education to report "suspected offense[s] involving marijuana or narcotics" to the police, which he did in this matter. (TS 45-6 to 13).

Significantly, the chief counsel of the National Association of Secondary School Principals, in an official publication of the Association, urges: "Violations of law should always be reported to the community's law enforcement agents; if the district has no regulation requiring principals to do so, it would be sensible to get one adopted." R. Ackerly, The Reasonable Exercise of Authority 19 (1969).

Both Advocates For Children and The Legal Aid Society regularly represent students who have been arrested on the basis of reports to the New York City Police Department by public school officials. The New York City Board of Edu-

cation has adopted a regulation mandating the summoning of police for the purpose of making an arrest upon discovery by school personnel of contraband weapons. This directive applies to contraband weapons possessed by "any person" on school property, but the concommitant "automatic superintendent's suspension" strongly implies that students are the intended subjects of this procedure. Regulations of the Chancellor, No. A-430, July 1, 1983, pp. 1-2.[6]

The Court of Appeals for the Fifth Circuit, after noting the agreement of most recent cases, correctly concluded that it is "beyond question that the school official, employed and paid by

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[6]The Chicago Board of Education has promulgated a similar rule, incorporated in its Uniform Discipline Code, which specifies that a "Principal or administrator must swear out a complaint if arrest is warranted. [emphasis in the original]." Board of Education, City of Chicago, 1982.



the state and supervising children who are, for the most part compelled to attend, is an agent of the government and is constrained by the fourth amendment." Horton v. Goose Creek Independent School District, 690 F.2d at 480.

The doctrine of in loco parentis does not undermine the conclusion that a search of a student conducted by a public school official is governmental rather than private action.

As the United States Court of Appeals for the Fifth Circuit recently stated, it no longer makes sense to view a public school official as the equivalent of a parent since the school official's duties "are not always exercised with only the child who is being disciplined or searched in mind" and since "frequently action toward one child will be taken to protect other children from him." Horton v. Goose Creek Independent

School Dist., 690 F.2d at 481 n. 18. The Court of Appeals added that, "in a compulsory education system, the parent does not voluntarily yield his authority over the child to the school, so the concept of delegated authority is of little use." Id. (citations omitted).

Legal obligations of public school officials to report students' violations of the law to the police (supra at 20-22) sharply distinguish the role of the contemporary public school official from that of one standing in place of a parent.

This Court, in the context of corporal punishment, has recognized the demise of the concept that a teacher's authority derives from that of parents. Ingraham v. Wright, 430 U.S. 651, 661-662 (1977). The doctrine of in loco parentis does not transcend constitutional rights and cannot be used to re-



move school searches from Fourth Amendment scrutiny. Picha v. Wielgos, 410 F.Supp. 1214, 1218 (N.D. Ill. 1976); Jones v. Latexo Independent School District, 499 F.Supp. 223, 236 (E.D. Texas 1980).

In the instant case, Mr. Choplik, asserting his authority as the assistant vice principal of a public high school, conducted a search of the student T.L.O. Public school officials may not exercise such governmental authority unconstrained by the Fourth Amendment. The Bill of Rights must be honored, as well as taught, in American public schools.

B. T.L.O. Had a Legitimate Expectation of Privacy in the Contents of Her Purse While On School Grounds, Entitling Her to the Protection of the Fourth Amendment

This Court has repeatedly held that public school students do not shed their constitutional rights at the schoolhouse gate. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). While this Court has not decided the precise issue of the Fourth Amendment's applicability to public school students, the overwhelming majority of courts that have addressed this issue have concluded that public school students have an expectation of privacy protected by the Fourth Amendment. See, e.g., Horton v. Goose Creek Independent School Dist., 690 F.2d at 478; Jones v. Latexo Independent School Dist., 449 F. Supp. at 234 Interest of L.L., 90 Wis.2d 585, 594-95, 280 N.W.2d 343, 348 (Ct. App. 1979). This nearly unbroken line



of authority accurately reflects society's perception that public school students have a justifiable expectation of privacy.[7]

Fourth Amendment safeguards apply when "the person invoking [the] protection can claim a 'justifiable', a 'reasonable', or a 'legitimate expectation of privacy' that has been invaded by government action." Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. 3194, 3199 (1984) (quoting Smith v. Maryland, 442 U.S. 735, 740 (1979)); Katz v. United States, 389 U.S. 347, 360-61 (1967)(Harlan, J. concurring). In addition, the expectation of privacy must be of a kind that "society is prepared to recognize

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[7]Virtually every commentator has reached the identical conclusion. See, e.g., Buss, The Fourth Amendment and Searches of Students in Public Schools, 59 Iowa L.Rev. 739, 792 (1974); Comment, Students and the Fourth Amendment: "The Torturable Class," 16 U.C.D.L.Rev. 709, 718-20 (1983).

as reasonable." Hudson v. Palmer, 52 U.S.L.W. at 5054 (quoting Katz v. United States, 389 U.S. at 360, 361).

"Determining whether an expectation of privacy is 'legitimate' or 'reasonable' necessarily entails a balancing of interests." Hudson v. Palmer, ___ U.S. ___, 104 S.Ct. at 3200. The strong privacy interest of the public school student must be balanced against the state's interest in maintaining an environment conducive to learning. Without diminishing the state's interest, amici contend that the balance must be struck in favor of the student's privacy interest in his or her person and effects.

Public school students have more than a mere subjective expectation of privacy while attending school. Unlike the case of convicted incarcerated prisoners, society acknowledges a reason-



able expectation of privacy in a public school student's person and belongings.

Despite the existence of school disciplinary problems, society has never indicated that public school students should be absolutely deprived of all privacy interests while attending school. The public school's legitimate interest in maintaining an environment conducive to learning is not in any way incompatible with the recognition of a reasonable privacy expectation for public school students. Surely, society is unwilling to equate public school students with incarcerated inmates for Fourth Amendment purposes.

Furthermore, society has chosen to grant a reasonable expectation of privacy in the contents of one's purse, wallet or pocket. United States v. Monclavo-Cruz, 662 F.2d 1285, 1287 (9th Cir. 1981). Searches of purses, like

searches of clothing and pockets, are the functional equivalent of a search of a person. See, e.g., United States v. Graham, 638 F.2d 1111, 1114 (7th Cir. 1981); United States v. Jeffers, 524 F.2d 253, 256 (1975); Dawson v. State, 40 Md.App. 640, 653, 395 A.2d 160, 167 (1978); Stewart v. State, 611 S.W.2d 434, 438 (Tex.Crim.App. 1981). A typical purse, particularly one carried by an adolescent female, is likely to contain a wide array of necessary and intimate items, such as feminine hygiene products, love letters, pictures, medications, a diary and a wallet.[8]

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[8]Petitioner's contention that a student's purse is an item unnecessarily brought into the school and therefore not entitled to Fourth Amendment protection is fundamentally at odds with the realities of contemporary society. Supplemental Brief for Petitioner Upon Reargument at 25. As demonstrated above, a purse normally contains some of life's necessities, such as money, keys and identification, as well as a host of personal articles.



Besides the nature of the articles, the essentially private character of a purse or handbag is illustrated by the fact that it is normally zippered or otherwised closed. Its contents are not usually subject to public view. Moreover, if exposed to the public, many of these items would cause extreme embarrassment, mortification or emotional harm.

The Seventh Circuit equated the search of a shoulder purse to that of a person and made the pragmatic observation that:

> The human anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried. To remedy this anatomical deficiency clothing contains pockets. In addition, many individuals carry purses or shoulder bags to hold objects they wish to have with them. Containers such as these, while appended to the body, are so closely associated with the person that they are identified with and included within the concept of one's person. To hold differently would be

> to narrow the scope of a search of one's person to a point at which it would have little meaning.

United States v. Graham, 638 F.2d at 1114. See also, 2 W. LaFave, Search and Seizure, sec. 5.3, at 307 (1978).

Public school students have the right to expect that their privacy interest in a purse or handbag will be upheld in the public school setting. Societal expectations of privacy are not extinguished at the schoolhouse door. Thus, the Fourth Amendment applies in the context of the public school.



## POINT II

THE SEARCH OF T.L.O.'S PURSE BY A PUBLIC SCHOOL OFFICIAL VIOLATED THE FOURTH AMENDMENT.

### A. Searches of Public School Students By Public School Officials Must be Subject to the "Probable Cause" Standard of the Fourth Amendment.

Consideration of the language of the Fourth Amendment and of this Court's Fourth Amendment jurisprudence compels a determination that "probable cause" is the standard to be applied to searches of students by public school officials. It is a cardinal principle that "'searches conducted outside the judicial process, without prior approval of a judge or magistrate, are per se unreasonable under the Fourth Amendment --subject only to a few specifically established and well-delineated exceptions.'" Mincey v. Arizona, 437 U.S. 385, 390 (1978)(quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

In creating the few, narrow excep-

tions to the warrant and probable cause requirement, the Court has balanced the governmental interests at stake against the nature and scope of the intrusion on individual privacy. Terry v. Ohio, 392 U.S. 1, 20-31 (1967). While the state's interest in a school environment conducive to learning is legitimate, there is no reason for the Court to adopt a broad new exception to the Fourth Amendment's warrant and probable cause requirement in order to advance that interest.[9] Considering the high expectation of privacy young children have in their person and personal belongings, the psychological trauma that unrestricted searches might

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[9]There is no need for the Court to place school searches in a "special category" as proposed by the Justice Department. The "exigent circumstance" exception already provides school officials with the flexibility necessary to respond quickly to situations that pose an immediate threat to school safety. See, Warden v. Hayden, 387 U.S. 294 (1967).



produce, and the adverse consequences to a proper educational atmosphere resulting from unreasonable searches, strict compliance with constitutional safeguards for student searches is compelled.

In support of their argument that an exception to the warrant and probable cause requirement be created for student searches, Petitioner and the Department of Justice cite a number of cases in which the Court has allowed searches under relaxed Fourth Amendment standards. In none of the cases cited, however, can support be found for an argument that public school students be subjected to diluted Fourth Amendment standards.

The analogy that the Department of Justice attempts to draw between the search of a public school student in the case at bar and administrative searches by health inspectors in Camara v. Muni-

cipal Court, 387 U.S. 523, (1967) does not survive scrutiny. The Court in Camara, in fact, refused to adopt an exception to the Fourth Amendment warrant requirement, stating that "administrative searches ... are significant intrusions upon the interests protected by the Fourth Amendment...." 387 U.S. at 534. While the Court did state that the facts that would justify an inference of probable cause to make an administrative inspection are different than those that would justify such an inference in a criminal investigation, the Court emphasized that the less stringent probable cause standard was authorized because inspections of dwellings for violations of building codes are not "personal in nature" and because they entail a rather limited invasion of a citizen's privacy. Id. at 537.

Equally spurious is the argument



that the "stop and frisk" exception to the warrant and probable cause requirement authorized by Terry v. Ohio, 392 U.S. 1, is analogous to a full-scale search of a public school student. The decision in Terry to allow warrantless "pat downs" of a person's outer clothing based on reasonable suspicion turned on the fact that such searches involved a limited intrusion on privacy and were not aimed at the discovery of crime.

Searches of schoolchildren by public school officials, however, do not always involve "limited" intrusions on the students' privacy interest and indeed are often "personal in nature." A number of searches of the person have been reported in cases in which school officials have searched the purses of female students[10], the pockets of male

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[10]State in the Interest of G.C., 121 N.J.Super. 108, 296 A.2d 102 (J.D.R.C. 1972).

students[11], a boy's socks[12], and cases in which students were subjected to strip searches because they were suspected of possessing drugs, weapons or missing money.[13]

If, as Petitioner suggests, violations of school rules are to be analogized to violations of administrative or regulatory codes, the scope of the

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[11] In re Fred C., 26 Cal.App.3d 320, 102 Cal.Rptr. 682 (1972); State v. Walker, 190 Or.App. 420, 528 P.2d 113 (1974); State v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975), cert. denied, 423 U.S. 1039 (1975); Commonwealth v. Dingfelt, 227 Pa.Super. 380, 323 A.2d 145 (Super.Ct. 1974); Interest of L.L., 90 Wis.App.2d 585, 280 N.W.2d 343 (Ct. of App. 1979).

[12] People v. Singletary, 37 N.Y.2d 310, 333 N.E.2d 369, 372 N.Y.S.2d 68 (Ct.App. 1975); State v. F.W.E., 360 So.2d 148 (Fla.Dist.Ct.App. 1978).

[13] Doe v. Renfrow, 475 F.Supp. 1012, 1020 (N.D.Ind. 1979), modified, 631 F.2d 91, reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981); Bellnier v. Lund, 438 F.Supp. 47 (N.D.N.Y. 1977); People v. Scott D., 34 N.Y.2d 483, 315 N.E.2d 466, 385 N.Y.S.2d 403 (1974); M.J. v. State, 399 So.2d 996 (Fla.Dist.Ct.App. 1981).



searches permitted should be similarly limited. Strip searches, searches of purses, pockets and socks, are not merely limited intrusions of the kind associated with the relaxed standards of reasonableness in Camara and Terry.[14]

The search in issue in the instant case constituted a significant intrusion on T.L.O.'s privacy and dignity. Not only did the assistant vice principal

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[14] Petitioner's argument that searches of public school students are also analogous to administrative inspections of heavily regulated industries does not fare any better under scrutiny. For reasons of public policy, the Court created an exception to the warrant -probable cause requirement for limited searches of certain heavily-regulated industries because such businesses voluntarily enter a regulated field on notice that they are subject to periodic inspections. United States v. Biswell, 406 U.S. 311 (1972)(firearms business); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)(liquor business). It cannot likewise be said that public school students, for whom school attendance is compulsory, voluntarily relinquish their privacy rights by entering the school grounds.

lack probable cause to conduct the full-scale search of T.L.O.'s purse, but, as the New Jersey Supreme Court found, the search could not even be justified on a less stringent "reasonable grounds" standard. State in the Interest of T.L.O., 94 N.J. 331, 463 A.2d 934 (1983). The assistant vice-principal had at best a "good hunch" that T.L.O.'s purse contained cigarettes. Id. at 347, 463 A.2d at 942. There was no necessity to conduct the search to avert any particular danger and the wholesale rummaging through the contents of T.L.O.'s purse violated her reasonable expectation of privacy. Possession of cigarettes in school was permitted; the contents of T.L.O.'s purse had no direct bearing on the alleged infraction. Moreover, there were absolutely no exigent circumstances to justify a search of her purse.



The warrant and probable cause requirement of the Fourth Amendment strikes an appropriate balance between the privacy rights of public school students and the public school's interest in maintaining an orderly environment conducive to learning. If the Court finds, however, that the school setting is appropriate for an exception to the warrant requirement, the Court should still hold that probable cause is required for warrantless searches.

Particularly in a case like the one at bar, where the fruits of a search result in a juvenile delinquency proceeding, it is clear that if the probable cause requirement is not applied, the student will not be afforded the same constitutional protections that an adult would enjoy in a criminal proceeding. State v. Mora, 307 So.2d 317 (La.), vacated sub nom. Louisiana v.

Mora, 423 U.S. 809 (1975), modified, 330 So.2d 900 (La.), cert. denied, 429 U.S. 1004 (1976). See also, State v. Young, 234 Ga. 488, 499-500, 216 S.E.2d 586, 594 (Gunter, J., dissenting), cert. denied, 423 U.S. 1039 (1975). It is now well settled that the juvenile justice system must reflect the fundamental fairness that the Constitution guarantees adult defendants. See In re Gault, 387 U.S. 1 (1967).

B. The Scope of the Search of Respondent's Purse Violated the Fourth Amendment's Ban on Unreasonable Searches.

Whether the Fourth Amendment standard adopted by the Court is characterized as probable cause or as some lesser standard such as "reasonable grounds," school searches must also be scrutinized as to their overall reasonableness in



order to pass constitutional muster.[15]

Under the two-tiered approach adopted by the New Jersey Supreme Court,[16] it must first be determined whether the school official had the requisite quantum of suspicion for initiating the search. Second, it must be determined whether the scope of the search that was conducted was "reasonable". In the case

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[15]For example, it would be absurd to argue that a search to discover evidence of a violation of a gum-chewing regulation would be reasonable under the Fourth Amendment, even if the school official conducting the search had probable cause to believe that the student had committed such a violation and had incriminating sticks of gum secreted somewhere on his or her person.

[16]The Court stated that searches will be deemed reasonable "if school officials have reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order, and the search itself was reasonable in scope." State in the Interest of T.L.O., 94 N.J. at 349, 463 A.2d at 943 (emphasis added).

at bar, the assistant vice principal did not have probable cause, or even reasonable grounds, to initiate a search, and the search to which T.L.O. was subjected was so intrusive of her personal privacy and dignity that it violated the general Fourth Amendment proscription against unreasonable searches.

In determining whether a search itself was "reasonable", the student's interest in the privacy and security of his or her person must be balanced against the state's interest in a safe and secure school environment that is conducive to learning. In determining whether the scope of a particular search is reasonable, courts have considered factors such as the threat to safety and security in the object sought to be obtained, the child's age, the scope and intrusiveness of the search and the exigencies of the situation. See, e.g.,



People v. Scott D., 34 N.Y.2d 483, 489, 358 N.Y.S.2d 403, 408, 315 N.E.2d 466, 470, (1974). Cf. Ingraham v. Wright, 430 U.S. 651, 662 (1977).

It is common knowledge that a young woman's purse may contain a number of highly personal and intimate articles. It is also common knowledge that a search of the contents of another's purse or handbag would be considered an extreme invasion of privacy. Such searches have been equated with the search of the person. See, supra, Point I,B at 29-30 and citations therein.

In spite of T.L.O.'s recognized interest in the privacy and security of her person, the assistant vice principal demanded her purse, opened it, rummaged through its entire contents, unzipped closed compartments, and read her personal correspondence. An intrusive search of this magnitude was patently

unreasonable. There was simply no legitimate purpose for the search; the assistant vice principal already had the account of a teacher who had witnessed the infraction, and a search of T.L.O. could only establish that she had cigarettes in her purse, the possession of which violated no school rule. The state's interest in determining whether T.L.O. was in possession of a package of cigarettes is greatly outweighed by her interest in the privacy and dignity of her person.

Limitations on the power of governmental officials to conduct searches are necessary to ensure that school children are protected against unwarranted intrusion by the state into their privacy and dignity, particularly in light of the psychological harm such searches might



produce.[17]

While the interest of public school officials in maintaining order and discipline in the schools is certainly legitimate, this interest can properly be achieved without depriving public school students of their Fourth Amendment rights. There is no basis in the Constitution to deny public school chil-

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[17] See, Doe v. Renfrow, 631 F.2d 91, 93 (1980) (7th Cir. 1980) (Swygert, J., dissenting from the order denying the petition for rehearing). See also, e.g., Bellnier v. Lund, 438 F.Supp. 47 (N.D. N.Y. 1977) in which the court held that the strip search of an entire fifth grade class after one student claimed that $3.00 was missing from his coat pocket was unconstitutional. (The money was never found.) Id. at 47.

Another dramatic example of an intrusive search resulting from school officials' unfettered discretion to conduct searches was reported in Mississippi. Approximately 30 fifth- and sixth-grade girls were called into the restroom and were individually asked to raise their dresses and lower their underpants simply to determine who might have left a soiled sanitary napkin on the floor of the restroom. Jackson (Mississippi) Clarion-Ledger, October 6, 1978, at 1A, col. 4.

dren the minimum protections of the Fourth Amendment; indeed, sound policy reasons exist that warrant a deep judicial concern for the rights of schoolchildren to protection from unconstitutional searches and seizures. (See Point III, infra). It is precisely these concerns that led the Court to state: "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960).



## POINT III

PUBLIC POLICY CONSIDERATIONS REQUIRE THAT SUBSTANTIVE LIMITATIONS BE PLACED UPON THE POWER OF PUBLIC SCHOOL OFFICIALS TO SEARCH PUBLIC SCHOOL STUDENTS.

When public students are made secure from arbitrary and intrusive searches that threaten their privacy, significant benefits inure to the overall educational process. Respect for educational authorities and institutions is enhanced, fairness in the administration of school discipline is promoted, and an atmosphere conducive to learning is encouraged. By placing substantive limitations on the power of public school officials to conduct student searches, both in terms of the sufficiency of the grounds to initiate a search and in terms of the reasonableness of the scope of the search, this Court will strike a much needed balance between the students' privacy rights and

the public school officials' duty to maintain an orderly environment.

The erosion of privacy and human values associated with privacy may be a greater danger, in the long run, than the conduct sought to be deterred with the aid of student searches. Buss, William, "The Fourth Amendment and Searches of Students in Public Schools, 59 Iowa L.Rev. 739, 792 (1974). The state interest in promoting an environment conducive to learning would, in fact, be undermined by allowing school officials unbridled discretion to conduct student searches. As the National School Boards Association recently reported:

> Policy makers who hope to secure such an [safe and orderly school] environment cannot merely rely on external controls - such as more visible police, more guards, or better alarm systems - or traditional approaches - such as punishment, removing troublemakers, and similar measures - which often harden delinquent behavior patterns, alienate troubled youths from the schools, and foster distrust.

National School Boards Association, Towards Better and Safe Schools (1984) at 9.[18]

Social values, reasoning processes and behavioral patterns are to a great extent shaped by experiences in the formative years of human development.

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[18]This observation was confirmed by an National Institute of Education-sponsored study of 600 schools which concluded that the more punitive teachers' attitudes and behavior were, the more likely teachers were to be the victims of crime and verbal abuse in school. G. Gottfredson and D. Daiger, "Disruption in 600 Schools," (November, 1979) ERIC #ED-183-701. A study of 500 schools specifically identified as having good discipline practices concluded that a common characteristic of these schools was their success in making students feel that they were welcome in the school and that they had some control over their environment. W. Wayson, et al., Handbook on School Discipline, at 10 (1982). Amici's experience representing suspended students reveals that students perceive invasions of their privacy to be at least as punitive as verbal criticism or a referral to the dean.

The school, through its policies and programs, plays a large part in socializing students toward the ethical application of legal principles. When public school officials infringe upon student privacy, they teach an unintended lesson of disrespect for the rights and needs of others. As one researcher noted:

> What educators must realize...is that how they teach and how they act may be more important than what they teach.... And children are taught a host of lessons about values, ethics, morality, character, and conduct every day of the week, less by the content of the curriculum than by the way schools are organized, the ways teachers and parents behave, the way they talk to children and to each other.

C. Silberman, Crisis in the Classroom, at 9 (1970).

Strict adherence to constitutional principles is particularly important in the schools if children are to learn that the Fourth Amendment and other constitutional protections are more than



empty promises. As this Court stated:

> That [Boards of Education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 637 (1943).

Fourth Amendment rights are, after all, not "mere second-class rights but belong in the catalog of indispensable freedoms." Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). Amici maintain that the withdrawal of constitutional protections in order to attack the disciplinary problem in the nation's schools is not only ineffective in solving the problem, but very likely will exacerbate it.[19]

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[19]The Department of Justice overestimates the current extent of disciplinary problems in the public schools. (Brief for the United States as Amicus Curiae

While a certain amount of deference should be granted to school officials in the operation of public schools, experience has shown that abuses of the Fourth Amendment occur when searches are made arbitrarily.[20] As a result, many school

(footnote continued)
at 23-24) While there is no question that school disciplinary problems do sometimes disrupt learning, recent data shows that the problem of violence and vandalism, which increased during the 1960's and 1970's, has declined in recent years. See Moles, Trends on Crimes in Schools, (1983). From 1977 to 1982, the number of crimes of violence against the person that took place in schools dropped by 16.2 percent. National Crime Survey, U.S. Census Bureau (1982).

[20]The reaction of students at Thomas Jefferson High School in New York City to an unannounced mass search for weapons is illustrative of the type of adverse effect that may unintentionally result from intrusions into the privacy of students. Students, arriving at school one morning, were met by thirty security officers who searched them using handheld metal detectors. Outraged, hundreds of students overturned tables, chairs, and desks and surged into the street in protest. As to the efficacy of the search, a school official reported that the students identified as among those most likely to be carrying weapons managed to evade the



districts have developed and implemented standards to be followed by public school officials when conducting searches of students, their personal belongings and lockers.

For example, the Richland County School District of Columbia, South Carolina, recently adopted standards governing school searches following an incident in which elementary school students were forced to remove their underwear as part of a search for a ten dollar bill missing from a teacher's purse. In the School Board's internal deliberations, it was agreed that the improper search resulted, in part, from the Board's lack of a formal policy on search and seizure. Minutes, Executive Session of Board of School Commissioners, Richland County School District One

(footnote continued)
search. New York Times, Nov. 11, 1982, at B3, col.1.

(October 18, 1983).[21]

Amici's experience reveals that the existence of substantive standards governing school searches has not proven to be burdensome for public school officials. In New York City, for example, a regulation of the Chancellor of the Board of Education detailing the limits on school searches and seizures has been promulgated and disseminated to every

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[21]The new policy provides that student searches are to be conducted when there is:

> "probable cause to believe that a student is in possession of weapons, illegal drugs, personal property wrongfully taken or withheld from another person, or other items harmful to the student or other students or to the welfare of the student body, teachers and administrative personnel ...." (Emphasis added.)

Any search must be authorized by the principal and conducted under his or her supervision upon a determination that probable cause exists. The policy contains strict rules governing the scope of allowable searches and the procedures to be followed. Id.



public school principal. Chancellor's Regulation A-432-Search and Seizure By School Officials, City School District of the City of New York (Issued October 1, 1979).[22]

The Detroit, Michigan Board of Education recently revised its code of student conduct, retaining substantive standards governing student searches. The code provides, in relevant part:

> Students have rights which have been established and guaranteed by the Fourth Amendment to the United States Constitution protecting the right of privacy of their person and freedom from the unreasonable

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[22]The Chancellor hears administrative appeals from student suspensions and issues written decisions to clarify the school search regulations. In one case, the Chancellor ruled that the practice of automatically conducting searches of students referred to the dean's office for discipline was improper because it "ignored the need to ascertain individual suspicion prior to intruding upon the student's privacy rights." In the Matter of the Appeal of Renaldo F., Chancellor's Decision, Board of Education of the City of New York at 4 (November 23, 1982).

search or seizure of property. The following guidelines apply to the seizure of items in the student's possession and the search of a student's school property (locker, desk): (1) There must be reasonable cause to believe that the student is in possession of an article, possession of which constitutes a crime or rule violation, or reason to believe that the student possesses evidence of violation of a law; or (2) There must be reason to believe that the student is using his/her locker, desk or other property in such a way as to endanger his/her own health or safety or the health, safety and rights of other person.

Detroit Board of Education Policy on Discipline and Student Rights (adopted July 31, 1984).

The state interest in promoting safety and order in the public schools is not furthered and is often impaired by arbitrary and highly intrusive student searches. Requiring public school officials to comply with substantive search and seizure standards will not impede school officials in the exercise of their duties but will promote an or-



derly and systematic approach to problems of school discipline.

## CONCLUSION

For the foregoing reasons, it is respectfully requested, that under the facts and circumstances of this case, this Court apply the traditional probable cause standard to the search of respondent's purse and affirm the judgment of the New Jersey Supreme Court.

Respectfully submitted,

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